United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1292

To Be Submitted

B P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 74-1292

UNITED STATES OF AMERICA,

Appellee,

-v.-

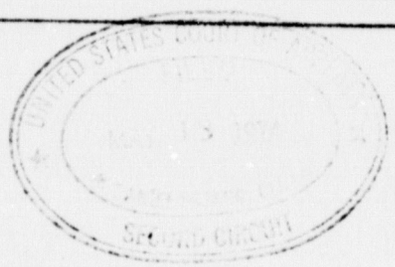
CONSTANCE ROGERS,

Defendant-Appellant.

On Appeal From The United States District Court

For the Eastern District of New York

BRIEF FOR THE DEFENDANT-APPELLANT



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PRELIMINARY STATEMENT

Constance Rogers appeals from a judgment of conviction entered in the United States District Court for the Eastern District of New York on February 22, 1974, after a trial before the Honorable Orrin G. Judd, United States District Judge, and a jury.

Indictment 73 Cr.906, in three counts, was filed on October 9, 1973. Count One charged the defendant with knowingly and wilfully making false, fictitious and fraudulent statements, on or about March 21, 1973, as to material facts in a matter within the jurisdiction of the Internal Revenue Service in violation of Title 18 United States Code, Section 1001. Counts Two and Three charged the defendant with violations of Title 18, United

States Code, Section 1001, except that said acts occurred on April 2, 1973 and April 4, 1973, respectively.

Trial commenced on January 28, 1974. On January 31, 1974, the jury found the defendant guilty on all three counts.

On February 22, 1974, the Court sentenced the defendant to one year and one day imprisonment on Count One, and two years imprisonment each on Count Two and Three, those terms to run concurrently with each other and concurrently with the sentence on Count One, thus totaling two years imprisonment. The defendant was also fined $5,000 on Count One.

The defendant is currently released on $20,000.00 bail pending appeal.

STATEMENT OF FACTS

A. The Government's Case.

The Government charged that on three different days, March 21, 1973, April 2, 1973 and April 4, 1973, the defendant knowingly and wilfully used fictitious names and used false writings and documents in cashing winning Superfecta tickets at various branches of the O.T.B. Corporation in New York City.

The Government charged that the defendant

on March 21, 1973, while using a fictitious name, cashed winning Superfecta tickets at Branch 29 of the O.T.B. Corporation, 95-28 Queens Blvd., Queens, New York, totaling $ 1,421.70. The Government's witness, one Rosalyn Friedman, testified that on March 21, 1973, she was employed as a supervisor by the O.T.B. Corporation at Branch 29. She further testified that whenever there was a payout of over $600.00 on any $2.00 bet, or $900.00 on any $3.00 bet, a form 1099 would have to be filled out by O.T.B. and the payee would have to sign a form on which the 1099 was attached (pp.113-14)*. Friedman went on to state that on March 21, 1973, the defendant signed such a form using the name Annette Lehman (the payout provided for on this form amounted to $1,421.70). She testified that the defendant submitted a social security card as identification at the time of signing the form and the name on the social security card was Annette Lehman (p.115). Friedman testified that she recorded the social security number as "534-20-4836", which number was taken from the card (p.152).

The Government's next witness was Michael Sullivan, a cashier for the O.T.B. Corporation at Branch

*Numbers in parentheses refer to pages of trial transcript as numbered in appendix.

22, 1501 Broadway, New York, New York. Sullivan testified that the defendant, on April 2, 1973, cashed approximately five or six tickets, totaling approximately $18,000.00, while using the name of Mary D. Grannum. At the time of cashing these tickets the defendant produced a social security card bearing the name of Mary D. Grannum, number 153-34-9362, and signed the 1099 form "Mary D. Grannum". Sullivan further testified that on April 4, 1973, the defendant again cashed a number of tickets totaling approximately $37,000.00 and again produced the same identification and again signed the name "Mary D. Grannum" (pp.168-9).

(It must be noted at this juncture that the crimes alleged to have taken place on April 2nd and April 4th of 1973 occurred in Branch 22, located at 1501 Broadway, New York, New York. The location of these acts is therefore within the jurisdiction of the United States District Court for the Southern District of New York and accordingly, not within the jurisdiction of the United States District Court for the Eastern District of New York. Furthermore, as is later pointed out in the argument, the indictment under Counts Two and Three, sets forth the address as

"1501 Broadway, New York City". There is also a Broadway in Queens, New York, which is within the jurisdiction of the Eastern District. It must be further pointed out that Count One specifically sets forth the address as "...95-28 Queens Blvd., Queens New York..", while Counts Two and Three list the address as "... 1501 Broadway, New York City ..", a flagrant attempt to hide the fact that such location is not within the jurisdiction of the trial court.)

After Michael Sullivan left the stand the next witness called by the Government was Mary D. Grannum who testified that sometime during December of 1972 she had had her wallet, which contained various credit cards, a driver's license and social security card and other identifying papers, stolen from her. She also testified that she had never cashed a Superfecta ticket (pp.196-197).

The Government further called as a witness Sam Rosen who, on April 2nd and April 4th of 1973 was a shift manager at 1501 Broadway. Rosen testified that on those dates he prepared the two 1099 forms signed by the defendant with the name of Mary D. Grannum. He

further testified that he witnessed the defendant sign the name of Mary D. Grannum.

Rosen further testified that on April 2, 1973, he made out two checks totaling $18,048.60 payable to cash. He further testified that on April 4, 1973 four more checks totaling $37,876.80 were made out by Jack DeMatteo, an employee of O.T.B. payable to cash. The checks totaling $18,048.60 corresponded to the 1099 form signed by the defendant on April 2nd using the name Mary D. Grannum and the checks totaling $37,876.80 corresponded to the amount listed on the 1099 form signed by the defendant on April 4th using the name Mary D. Grannum (pp.317-320).

At the end of the Government's case, Judge Judd denied the defendant's motion for a dismissal of the indictment (pp.330-331).

B. The Defendant's Case.

The defendant, Constance Rogers, testified on her own behalf. The defendant testified that she came to New York shortly after she was convicted in Pennsylvania of possessing and selling pornographic material. She stated that upon coming to New York she acquired indentification under the name of Annette Lehman, Annette being her middle name and Lehman being her first married

name. (The defendant was married in 1958 to Donald Lehman, said marriage ending in divorce in 1960.) She further testified that because of her conviction in Pennsylvania and because of a second subsequent marriage (the defendant was married to one Ted Rodgers in 1960 and said marriage ended in divorce in 1967) she was considered a very bad credit risk and therefore, upon coming to New York, she used the name Annette Lehman in order to obtain credit (pp.397-400).

The defendant stated that on March 21, 1973 she had cashed a Superfecta ticket. She testified that she had lost her indentification with the name Constance Rodgers on it but knew that the important part of going to cash a ticket was her Social Security number. On March 21, she had her Social Security card under the name of Annette Lenman with her and presented this identification for the purpose of cashing her ticket since this Social Security card, even though it bore the name Annette Lehman, had her legal Social Security number, 161-30-5848, listed thereon.

She further testified that the number 534204836 which was handwritten thereon was a serial number of a combination safe which she owned. She also

stated that every employee at Branch 29 knew her as Constance and not Annette (pp. 406-407).

The defendant next testified that the only other times she cashed winning Superfecta tickets was on April 2,4 and 5, 1973. On the evening of April 1, 1973, one Joseph Pullman, a friend of the defendant came to her apartment and asked the defendant if she would do him a favor. He handed the defendant some Superfecta tickets and stated that they belonged to his girlfriend, Mary Grannum, who was at that time in the hospital. The defendant stated that she was asked by Pullman to go to the O.T.B. branch at 1501 Broadway,ask for Sam and cash the tickets. On April 2, 1973, when she approached Sam for the purpose of cashing the tickets, she advised Sam that "... this isn't my I.D. The Bear sent me here today and asked me to get this cashed for his girlfriend who is hospitalized. At this time if you want me to I will sign my name to it, which I would prefer". Sam told her that she would have to sign Mary's name. After she did this she received a check from Sam (pp. 413-416).

The defendant went on to testify that the same procedure took place on April 4, 1973. Again, she was cashing the tickets for Pullman because Mary,

his girlfriend, was still hospitalized (p.417).

The defendant went on to testify that on April 5, 1973, she helped Pullman purchase tickets at a certain O.T.B. branch and then cashed 72 winning tickets, of which seven were hers, totaling over $50,000.00, at another branch. No 1099 was signed by the defendant or Pullman as the Superfecta paid $803.00, which was not in excess of the required $900.00 minimum on a $3.00 bet (pp. 418-23).

The defendant testified that the aforesaid transactions were the only times she had bet on the Superfecta and that overall, she was losing money and that she had in fact been served with a dispossess for non-payment of rent in June of 1973 (p.424).

ARGUMENT

POINT I

THE VERDICT AS TO COUNT ONE SHOULD BE SET ASIDE AS BEING AGAINST THE WEIGHT OF EVIDENCE IN THAT THE GOVERNMENT FAILED TO PROVE THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT.

The burden is on the Government to establish beyond a reasonable doubt every element necessary to constitute the crime. Davis v. United States, 1895, 160 U.S. 469, 487, 16 S. CT. 353,358, 40 L. Ed. 499; In re Winship, 1970, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L. Ed. 2d 368.

Title 18 of the United States Code, Section 1001, provides as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device, a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

It was alleged in Count One that the defendant violated Section 1001 when she gave to the O.T.B. authorities and signed a Form 1099 using a fictitious name, to wit: Annette Lehman. It is respectfully submitted that the evidence adduced at trial showed that this was no violation of Section 1001.

The defendant testified that upon coming to New York she acquired identification under the name of Annette Lehman, Annette being her middle name and Lehman being her first married name. This was done in order to obtain credit in New York (in Pennsylvania the defendant was considered a bad credit risk because of a prior criminal conviction for selling and possessing pornography and because of a divorce she had obtained from her first husband, Donald Lehman, in 1960). (pp. 396-400).

She further testified that she had a Social Security card with the name Annette Lehman on it and that this card had her legal social security number listed thereon, to wit: 161-30-5848, the same number given to the defendant under the name Constance Rodgers. On March 21, 1973, when she went to cash a winning Superfecta ticket, she presented this card as identification as she had lost her identification with the name Constance Rodgers on it. The number "534204836", which an O.T.B. employee wrote down as the defendant's social security number when she presented the card for identification, was, the defendant testified, a number of a combination safe which she

had written on the card previously. (p. 400-1)

The defendant testified that she knew that the important part of cashing the ticket was her Social Security number and as her Social Security card, even though it bore the name Annette Lehman, had her legal Social Security number on it, she had no hesitancy about presenting it for identification.

The only evidence the Government introduced to prove a crime was the testimony of Rosalyn Friedman. She tesified that on March 21, 1973, the defendant signed a Form 1099 using the name Annette Lehman. She further testified that the defendant submitted a Social Security card as identification and the number "534-20-4836" was taken therefrom (pp. 113-115). No evidence was introduced to disprove the defendant's statement that said number was handwritten on the card and was the number to her combination safe.

The basis of the crime alleged in Count One is that the defendant "claimed she was in individual named Annette Lehman, whereas in truth and in fact, as she then knew, her name was not Annette Lehman."

The issue involved in Count One is whether this in fact was a false and fraudulent statement in violation of Section 1001.

As the identification presented had the defendant's legal social security number listed thereon, the winnings would have been attributed to the defendant for tax purposes if the O.T.B. employee had copied down the correct number as given her. Furthermore, the name Annette Lehman was not a false and fictitious name as the defendant had been known as Lehman.

At common law, a person may assume any name, so long as it does not interfere with the rights of others. Queen v. Queen, 1954, 135 N.Y.S. 2d 536. This may be done without legal proceedings of any sort, even though there is a statute providing for change of name. Lana v. Brennan, 1953, 124 N.Y.S. 2d 136.

In the absence of fraud, one may use any name one wishes. Manor Homes, Inc. v. Sava, 1973, 342 N.Y.S. 2d 291. The defendant in order to establish a line of credit in New York, used the name Annette Lehman (for which there was ample basis). This, in and of itself, would not be considered illegal. Furthermore, she used the same Social Security number for

Annette Lehman as was given to Constance Rodgers. The Government, as a matter of law, failed to prove that the defendant used a false or fictitious name when she signed the Form 1099. Accordingly, no violation of Section 1001 was proven.

POINT II

COUNTS TWO AND THREE OF THE INDICTMENT SHOULD HAVE BEEN DISMISSED IN THAT PROPER VENUE WAS NOT IN THE EASTERN DISTRICT OF NEW YORK.

A. The Government Failed to Prove Proper Venue.

One of the things the Government has the burden of proving is venue. It is an essential part of the Government's case. Without it, there can be no conviction. United States v. Gross, 2nd Cir. 1960, 276 F.2d 816; United States v. Jones, 7th Cir., 1949, 174 F.2d 746.

Article III, Section 2, paragraph 3 of the Constitution of the United States provides:

> The Trial of all crimes, except in cases of impeachment, shall be by Jury; and such trial shall be held in the State where said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by Law have directed.

This provision is further amplified by the Sixth Amendment which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law ...

Count One of the indictment charged that defendant,

> knowingly and wilfully made false fictitious and fraudulent statements and representations and made and used false writings and documents knowing the same to contain false, fictitious and fraudulent statements, as to material facts in a matter within the jurisdiction of the Internal Revenue Service, an agency of the United States in that the said Constance Rogers at Branch 29 of the O.T.B. Corporation, 95-28 Queens Blvd., Queens, New York, stated and represented and used false writings and documents in cashing winning Superfecta tickets in that she claimed she was an individual named Annette Lehman, whereas in truth and in fact, as she then knew, her name was not Annette Lehman.

in violation of Title 18, United States Code, Section 1001.

Count Two alleges a similar violation of Section 1001 except that it is alleged that the defendant, on April 2, 1973, at Branch 22 of the O.T.B. Corporation, located at "1501 Broadway, New York City", signed her name as Mary Grannum. Count Three sets forth the exact same violation of Section 1001, as specified in Count Two, except that said act occurred on April 4, 1973.

During trial it was first learned that Branch 22, 1501 Broadway, was in Manhattan and not Queens. Manhattan is within the jurisdiction of the Southern District and proper venue would therefore lie in the District Court for the Southern District of New York. As Counts Two

and Three were tried in the District Court for the Eastern District of New York, the Government failed to prove proper venue and the trial court was obligated as a matter of law to dismiss said counts. United States v. Gross, supra.

A recent case of particular interest is United States v. Walden, 4th Cir., 1972, 464 F. 2d 1015, cert. den. 93 S. Ct. 165. In that case ten defendants were indicted for conspiracy to commit larceny of a federally insured bank, conspiracy to receive stolen money from a federally insured bank and conspiracy to transport stolen money in interstate commerce. The remaining counts of the 13 count indictment charged various defendants with the acts of robbery and transporting stolen money. In each count it was alleged that the defendants charged in that count, caused, in the District of South Carolina, the prohibited act to be done. However, in counts 2,3,5,6,8, 10 and 13, the banks that the defendants were accused of entering were located in states other than South Carolina. All ten defendants were tried together on all counts of the indictment in the District of South Carolina. The jury found the defendants guilty of all charges, except certain defendants were found not guilty of conspiracy. In his decision, Judge Craven restated the principles

set forth in United States v. Johnson, 323 U.S. 273, 276, 65 S. Ct. 249, 251, 89 L. Ed. 236 (1944). In that case the Supreme Court indicated which way any question as to venue was to be resolved.

> Questions of venue in criminal cases .. are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it.

In the Walden case, the propriety of venue in the District of South Carolina for trial of all defendants for the crime of conspiracy was never questioned. However, the Government contended that the venue for trial on those counts which alleged unlawful entry of banks located in other districts may property be laid in the District of South Carolina. With this the Court disagreed. The Court held that unlawful bank entry was not a continuing offense. Entry into a bank to commit larceny could only take place in the state where the federally insured banks were located.

In the case at bar the question presented is more easy to decide as the defendant was never charged with conspiracy. She was indicted alone on three separate substantive counts. Count One occurred in the Eastern District and Counts Two and Three occurred in the Southern

District. Accordingly, Counts Two and Three should have been dismissed.

The violations of Title 18 U.S.C., Section 1001, could never be construed as continuing. They were separate, distinct acts, each committed at different times and in different places, one of which was located in the Eastern District. Each giving and signing of an alleged fictitious name was a separate violation of Section 1001. Each giving and signing of an alleged fictitious name could be likened to each unlawful entry into a bank as described in the Walden case, a fortiori, each giving and signing of an alleged fictitious act could only take place in the district where the branch of the O.T.B. was located. "To hold otherwise would require that we ignore the Constitution and its interpretation in United States v. Johnson, ... and this we cannot do." United States v. Walden, supra.

B. The Objection To Venue Was Not Waived.

It must be brought to the Court's attention that Count One sets forth a specific address, "95-28 Queens Blvd., Queens, New York", while Counts Two and Three set forth a more general address, "1501 Broadway, New York City". As

there is a Broadway in both the Southern District (New York County) and the Eastern District (Queens County), one could not help but assume from a reading of the indictment that the acts alleged in Couts Two and Three occurred in Queens County which is within the jurisdiction of the District Court for the Eastern District of New York. However, it was not until trial did defense counsel learn that said acts occurred in the Southern District, as the wording on the indictment only stated "1501 Broadway, New York City ".

At the end of the Government's case, the defendant moved for a directed verdict of acquittal and said motion was denied. After both sides had rested the defendant again moved for a directed verdict of acquittal and again said motion was denied. Both sides then proceeded with their summation. At the end of the Government's summation, the judge proceeded to charge the jury. At the end of the judge's charge the jury was excused for the day (at approximately 4:30 P.M.) and told to return the following day for the purpose of beginning their deliberations. It was at this time that a specific objection to venue was made by defense counsel and the following colloquy took place:

> Mr. Bobick: Your Honor, at this time -- and it wgs (sic) only when listening to your charge, that I realized that I must move for the withdrawal of a juror and a declaration of a mistrial.

> The Court has no jurisdiction. Counts Two and Three did not occur in the Eastern District but in the Southern District. 1501 Broadway is Manhattan, in the Southern District of New York.
>
> Mr. Meyerson: NO, THAT IS IN ELMHURST. (emphasis supplied)
>
> Mr. Bobick: No, it is in Manhattan.
>
> The Court: 1501 Broadway ---
>
> Mr. Bobick: 42nd Street, Manhattan. That is not the Eastern District but the Southern District in New York, and it has no business being here. If the jury heard evidence evidence on a count not within the jurisdiction of the Court, it cannot come to a determination.
>
> Mr. Meyerson: It states the address and it gives notice of venue.
>
> The law is clear in this Circuit, as well as in any other Circuit that venue is waivable as soon as there is notice of it, and there is notice in counts two and three.
>
> Mr. Bobick: 1501 Broadway, New York. That is the Eastern District as well as the Southern District.
>
> At this point we never waived venue. I didn't realize it until such time as the Court read the indictment, saying 'In the Eastern District of New York. The Grand Jury charges the defendant committed the crime in the Eastern District of New York'. (pp.564-65)

As can be seen from the above, even the Assistant United States Attorney was under the impression that the acts alleged in Counts Two and Three occurred in the Eastern District.

It is respectfully submitted that the objection to venue was never waived by the defense. Firstly, venue could not be waived as proper notice thereof was not given in that proper venue was not apparent on the face of the indictment. Secondly, not only was the objection to venue made before jury deliberations timely made, but the motions for directed verdict of acquittal made at the end of the Government's case and after both sides rested included an objection to venue as well.

The questions of venue and objections thereto are well settled. In United States v. Gross, 2nd Cir., 1960, 276 F. 2d 816 at p. 818, Judge Friendly in considering the government's claim that Gross waived any objection to venue, stated:

> The claim would be well founded if this were a civil case, where the privilege as to venue "is of such a nature that it must be asserted at latest before the expiration of the period allotted for entering a general appearance and challenging the merits." Commercial Casualty Ins. Co. v. Consolidated Stone Co., 1929, 278 U.S. 177, 179-180, 49 S. Ct. 98, 99, 73 L. Ed. 252. However, no similar time limitation on the making of the objection exists in criminal cases where questions of venue "are not merely matters of formal legal procedure," United States v. Johnson, 1944, 323 U.S. 273,276, 65 S. Ct. 249, 251 89 L. Ed. 236, but of Constitutional right. As said by Judge Minton, as he then was, in United States

v. Jones, 7 Cir. 1949, 174 F. 2d 746,748, "One of the things the Government has the burden of proving is venue. It is an essential part of the Government's case. Without it, there can be no conviction. U.S. Const. Amend. VI ***" and further a "motion for acquittal made at the conclusion of all the evidence properly raised the question of venue". Accord, United States v. Browne, 7 Cir. 1955, 225 F. 2d 751,755.

In United States v. Brothman, 2nd Cir. 1951, 181 F. 2d 70, the defendant Brothman was charged with one substantive crime of endeavoring to influence another to give false testimony before a grand jury. Both Brothman and another defendant, Moskowitz, were also charged with the crime of conspiracy. It was conceeded by the Government that all of Brothman's endeavors to influence the testimony of one Gold took place in the Eastern District of New York, although Gold's testimony was given in the Southern District. At the close of the Government's case Brothman moved for a directed verdict on the substantive count on the ground that the evidence was insufficient. This motion was renewed at the end of the entire case. The Government's only answer to Brothman's argument is that Brothman waived his constitutional privilege to be tried where the crime was committed by going to trial in the southern district without objection. In reversing Brothman's conviction on the substantive count, Chief Judge Swan stated at page 72:

> Where the indictment discloses lack of venue, going to trial without objection to venue is a waiver ... In the case at bar Brothman could not know that venue would not be proved until the prosecutor's evidence was closed; he then moved for a directed verdict. We may assume arguendo that had he argued the motion and said nothing about failure to prove venue, he might be held to waive the defect. But the motion was denied without argument being heard. In United States v. Jones, 7 Cir., 174 F. 2d 746, Judge Minton (now Mr. Justice Minton) speaking for the court held that a MOTION FOR ACQUITTAL MADE AT THE CONCLUSION OF ALL THE EVIDENCE PROPERLY RAISED THE QUESTION OF VENUE IN THE COURT BELOW. SUCH A MOTION NEED NOT SPECIFY THE GROUNDS THEREFOR. (emphasis supplied) We agree with the Seventh Circuit decision.

It is of great import to note that the defendant was not charged with conspiracy. There were three substantive counts each alleging three separate and distinct acts. It is well settled that since a conspiracy is a continuing crime jurisdiction exits either where the conspiracy was entered into or where any overt act was committed. Hyde v. United States, 225 U.S. 347, 32 S. Ct. 793, 56 L. Ed. 1114. However, in the case at bar, no conspiracy was charged. Accordingly, the trial court should have dismissed Counts Two and Three as the Government failed to prove an essential element of the crime, that of venue.

It must be further pointed out that the defendant received a sentence of two years imprisonment

on Counts Two and Three, each to run concurrently with each other as well as concurrently with a sentence of one year and one day on Count I.

POINT III

IN THE EVENT THE VERDICT AS TO COUNT ONE IS NOT SET ASIDE FOR THE REASON ARGUED IN POINT I, THEN SUCH VERDICT SHOULD BE SET ASIDE AS THE DEFENDANT WAS PREJUDICED BY THE INTRODUCTION INTO EVIDENCE OF THE CRIMES ALLEGED IN COUNTS TWO AND THREE AND OTHER CRIMES.

As previously stated, the crimes alleged in Counts Two and Three of the indictment took place within the Southern District. However, even though, for reasons previously stated in Point II, the trial judge should have dismissed Counts Two and Three because the Government was unable to prove an essential element of those crimes, that of venue, the defendant was incurably prejudiced as to Count One by the introduction into evidence of the acts alleged under Counts Two and Three. Even if the trial court had dismissed Counts Two and Three after trial, and even if this Court holds that such should have been the case, the defendant nevertheless, was still prejudiced by the introduction into evidence of other crimes allegedly committed by the defendant.

In the case at bar the defendant was indicted for three separate and distinct violations of Title 18, U.S.C. Section 1001. During the trial the jury heard evidence pertaining to these violations.

We do not have the usual case where the prosecution introduces other crimes in order to prove the crime for which the defendant was indicted. What we do have is a case where the jury is hearing evidence as to crimes for which the defendant was indicted.

Underhill, in discussing the adminissibility of evidence of other crimes, states that

> The large majority of persons of average intelligence are untrained in logical methods of thinking, and are therefore prone to draw illogical and incorrect inferences and conclusions without adequate foundation. From such persons jurors are selected. They will very naturally believe that a person is guilty of the crime with which he is charged if it is proved to their satisfaction that he has committed a similar offense, or any offense of an equally heinous character. And it cannot be said with truth that this tendency is wholly without reason or justification, as every person can bear testimony from his or her experience that a man who will commit one crime is very liable subsequently to commit another of the same description.

1 Underhill, Criminal Evidence §205 (5th ed. 1956).

In Count One the defendant's alleged criminal act was that she signed the name "Annette Lehman" to the Form 1099. In Counts Two and Three the alleged criminal acts were the signing of the name "Mary Grannum". There is a serious question of law, as previously discussed,

whether or not the signing of "Annette Lehman" was in fact a violation of Section 1001. The defendant used this name while in New York, and this, in and of itself, was not criminal. However, the jury also heard evidence as to the signing of the name "Mary Grannum". The defendant took the stand and testified as to the circumstances surrounding all three acts. Quite obviously her testimony concerning Counts Two and Three was not as strong as the testimony concerning Count One. This can be seen from the fact that the trial judge sentenced the defendant to two years imprisonment on Counts Two and Three and only one year imprisonment on Count One. If the trial judge, who conceededly is more astute in these matters than would be the average juror, saw fit to punish the defendant more severely on Counts Two and Three, there can be no question as to the fact that the jury convicted the defendant on Count One because of the cumulative effect of hearing the evidence concerning Counts Two and Three. Because the evidence heard by the jury concerning Counts Two and Three was evidence concerning acts for which the jury knew the defendant was indicted, such evidence may have influenced the jury to return a verdict of guilty as to Count One.

What we have here is a case where the crimes charged were of such a nature that the jury might have regarded one as corroborative of the other, when, in fact, no corroboration existed. See Kidwell v. United States, (1912) 38 App. D.C. 566.

If the defendant had been indicted on Count One only, then the crimes alleged in Counts Two and Three could not have been introduced into evidence for any purpose other than that of proving the defendant guilty of the crime for which the defendant was indicted and this has been held to be reversible error. See Boyer v. United States, (1942) U.S. App. D.C. 397, 132 F. 2d 12.

On cross-examination, the prosecution asked the defendant whether she ever used the name Constance Baker on April 5, 1973, when she cashed other winning Superfecta tickets. The defendant answered in the negative (p. 444). In rebuttal, the Government called as a witness one Joan Siegel, who testified that on April 5, 1973, she was a branch manager of Branch 64, in Elmhurst, Queens. She testified that on said date, the defendant using the name Constance Baker, cashed approximately $56,000.00 worth of Superfecta tickets (p. 460).

Also in rebuttal, and again over the objection of defense counsel, the Government called as a witness Ira Udell who testified that one Forest Gerry had cashed

some winning tickets using the identification of Annette Lehman. He further testified that he cashed tickets for Gerry on other occasions and that he received approximately $2,000.00 from Gerry for cashing his tickets without proper identification (pp. 483-490).

It is respectfully submitted that the defendant was severely prejudiced by the introduction into evidence of the aforesaid acts, especially those acts allegedly committed by another, one Forest Gerry. The defendant was never charged with conspiracy. The introduction into evidence of the aforesaid irrelevant testimony was for no other purpose than to instill in the minds of the jurors the fact that the defendant has a propensity to commit crime and that she knew other individuals who may have also committed crimes. This testimony, taken into account with the testimony concerning Counts Two and Three so prejudiced the minds of the jurors that they had no other alternative but to cumulate the evidence and use it to find the defendant guilty on Count One, when in fact such evidence was not at all corroborative of the crime alleged in Count One.

In Kempe v. United States, 8th Cir., 151 F 2d 680 (1945), the court stated:

> The general rule is that in a criminal prosecution proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are of the same nature as the one charged in the indictment, is incompetent and inadmissible for the purpose of showing the commission of the particular crime charged. The accused is to be convicted, if at all, on evidence showing his guilt of the particular offense charged in the information. Evidence of other crimes compels a defendant to meet charges of which the information or indictment gives no information, confuses him in his defense and raises a variety of false issues. Thus the attention of the jury is diverted from the charge contained in the indictment or information. 20 Am. Jur.Sec. 309, p. 287; Gart v. U.S., 8 Cir., 294 F 66; Parpis v. U.S., 8th Cir., 260 F. 529, 531.

Such evidence tends to draw the attention of the jury away from a consideration of the real issues on trial, to fasten it upon other questions, and to lead them unconsciously to render their verdict in accordance with their views on false issues rather than on the true issues on trial.

C O N C L U S I O N

The judgment of conviction should be reversed in all respects.

Respectfully Submitted,

BOBICK, DEUTSCH & SCHLESSER
Attorneys for Defendant-Appellant

BOB A. KRAMER
Of Counsel

UN ITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
- -X

UNITED STATES OF AMERICA

- v. -

CONSTANCE ROGERS,

Defendant-Appellant

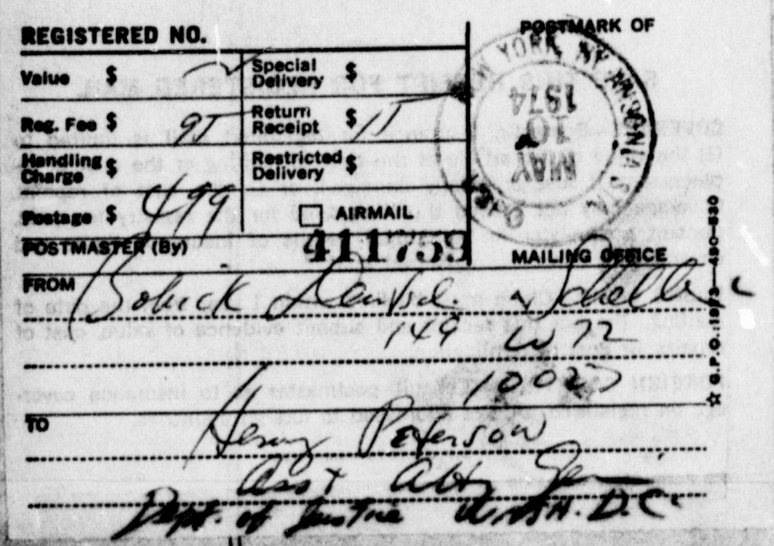
- -X

State of New York)
County of New York) SS.:

WILLIAM LUNDSTEN, being duly sworn, deposes and says:

That I am over the age of 18 years and reside at 149 West 72nd Street, New York, New York.

That on the 10th day of May, 1974 deponent served the Defendant-Appellant's Brief and appendix upon Assistant Attorney General Henry Petterson, Department of Justice, Washington D.C. 20530 by depositing a true copy of same enclosed in a post paid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.



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WILLIAM LUNDSTEN

Sworn to before me this
10th day May 1974

MARIANNE BOBICK
Notary Public, State of New York
No. 60-0332535
Qualified in Westchester County
Certificate filed in New York County
Commission Expires March 30, 1975